Deloitte.

Gibraltar Tax Alert

3 October 2014

European Commission State aid investigation extended to include a review of tax rulings in Gibraltar

Contacts

Joseph Caruana
jcaruana@deloitte.gi

Stephen Reyes
sreyes@deloitte.gi

Louise Gonçalves
logoncalves@deloitte.gi

The European Commission ("EC") announced[1] earlier this week that it is extending the scope of its ongoing state aid investigation into the Gibraltar corporate tax regime to include a review of tax rulings issued by the Gibraltar tax authorities.

Background

In October 2013[2], following a complaint from Spain, the EC opened an investigation to verify whether Gibraltar's new corporate tax regime, which came into effect on 1st January 2011, following the introduction of the new Gibraltar Income Tax Act 2010 ("ITA 2010"), selectively favours certain categories of companies thereby breaching EU state aid rules.

The ITA 2010 replaced the previous Tax Act which was repealed on 31st December 2010. Although the ITA 2010 retained as its basis of taxation the territorial principle of all income "accrued in, or derived from" Gibraltar is taxed, it removed interest income and royalties from the scope of taxation. The EU investigation is focused on examining these two areas in particular.

The Gibraltar Government was quick to respond and have since made changes to the ITA 2010 to allay the EU's concerns, bringing into the scope of taxation both intercompany interest income (where this exceeds £100,000 per annum) as of 1st July 2013, and, royalty income as of 1st January 2014.

Tax rulings are available in Gibraltar to allow taxpayers to obtain advance confirmation of how the Income Tax Office will apply local tax legislation to a taxpayer's particular circumstances. In particular it is common for companies to request advance tax rulings where they believe that their income does not accrue in or derive from Gibraltar and they want certainty that the Income Tax Office will agree with that interpretation. Income that does not accrue in, or derive from Gibraltar is outside the scope of taxation.

---

[1] European Commission Press release of October 2014 is available at IP-14-1073.

[2] European Commission Press release of October 2013 is available at IP/13/955.

The Commission confirmed that they have assessed 165 tax rulings granted by the Gibraltar tax authorities in 2011, 2012 and up to August 2013, i.e. the period since the new ITA 2010 came into force. The Commission is concerned that the rulings have been granted without performing an adequate evaluation of whether the companies' income has been accrued in or derived from outside Gibraltar and therefore is exempted from taxation in Gibraltar. The Commission considers that potential misapplication of the provisions of the ITA 2010 may constitute state aid.

The Gibraltar Government has confirmed that it is confident that all advance rulings are issued within the parameters of the legislation and can be properly substantiated.

Deloitte View

Companies with advance rulings based on information which properly reflects the companies' actual circumstances should have nothing to worry about from this extension in the scope of the EU investigation. Tax rulings do not confer any additional rights to recipients that they did not already have under the legislation at the time. Therefore where the location of a company's activity is such that the company's income does not accrue in or derive from Gibraltar that income will not be taxable in Gibraltar whether the company has an advance ruling or not and therefore in these circumstances just having an advance ruling cannot be state aid.

We are therefore of the opinion that the practice of providing tax rulings after proper consideration of the circumstances cannot in itself constitute state aid as they do not extend any additional rights to the recipient that did not already exist under current legislation.

All tax rulings are issued with a clause that they are "*based on the relevant current law…*" and "*…if any material fact or circumstance upon which these confirmations have been based should change or not materialise or if found to be inaccurate…*" the ruling can be revoked or anti-avoidance provisions applied. This will ensure that where the authorities become aware that the company's income should be subject to tax, they will revoke the ruling or apply anti-avoidance provisions to ensure the income is taxed.